IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

CIVIL APPLICATION NO. 95 OF 2004

IN
FIRST APPEAL (ST) NO. 48100 OF 2004

Shenectady Herdilla Limited ... Applicant

Vs.

Banibai Dhondu Sutar and Others ... Respondents

Mr. F. Divetri with Mr. Anil Agarwal holding for Mr. Mustafa Motiwala for the Applicant.

Mr.K.K. Tated, A.G.P. for State.

Mr. Y.S. Jahagirdar, Sr. Counsel with Mr. R.S. Datar for Respondent Nos. 1 to 7.

Ms. Deepa Chavan with Mr. Kiran Gandhi i/by M/s. Little & Co. for Respondent No. 8.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,JJ.
DATED : SEPTEMBER 03, 2004
P.C. :

1. The appellants herein have preferred an appeal against the judgement dated 17.8.1999 passed by the Jt. Civil Judge, Sr. Division. By the said judgement, the suit filed by late Balya Ragho Patil now represented by legal heirs was decreed. The suit was in respect of the land acquired under the provisions of the Maharashtra Industrial Development Act, 1961. The land was acquired for

the Maharashtra Industrial Development Corporation who in turn have leased out the land in favour of the appellants herein. As there was delay of about 4 years one month in filing the appeal, the present application has been taken out for condonation of delay.

. It is contended on behalf of the appellants that the suit was being looked after by one Parthasarathi who had engaged an advocate Mr. Balan before the trial Court. At the relevant time, Parthsarathi was posted at the factory premises and subsequently came to be transferred to the Head Office. The appellants were not aware of the proceedings. The said Parthasarathi subsequently left the services of the company in the year 1987 and thereafter expired. It is only when the notice of execution proceedings were served on the company in Regular Darkhast No. 72 of 2000 sometime in October, 2000, did they become aware of the decree passed. They thereafter took steps and depute one B.B.Poojari, Officer of the Applicant to Thane Court. He made enquiries and learnt that in the said suit, Balan had been engaged by Mr. K. Parthasarathi. He contacted Advocate Balan who intimated to him that he had

been engaged by Parthasarathi and that based on the instructions, he had filed written statement on behalf of the appellant herein. Advocate Balan informed that he had sent various reminders and letters to receive instructions from Parthasarathi. However, Parthasarathi neither contacted advocate Balan nor gave any instructions and on account of that Advocate Balan had filed no instructions pursis in the year 1995 and withdrew his appearance from the suit and in these circumstances, the suit proceeded exparte. On coming to now all these facts, the appellants appointed one Mrs. M.N. Karandikar who took inspection of the records and thereafter on 12.2.2001 an application was filed before the court for setting aside the judgement dated 17.8.1999. That application is numbered as 72 of 2001 and is pending before the trial court. The appellant herein thereafter took advice of their advocates practicing in their court and were advised to file appeal to challenge the judgement on merits. It is in these circumstances, that they have preferred an appeal. It is therefore, submitted that there is sufficient cause for condoning delay. Apart from that it is pointed out that the appellants herein had filed petition before this court being Writ Petition No. 506 of

1995 on 27.1.1995 in the matter of resettlement of people who were affected by the proceedings taken under M.I.D.C. Act. Consent terms came to be filed before this court and the petition was disposed of in terms of the consent terms, by order dated 13.9.1995. It is therefore, pointed out that the appellants had been taking steps. It is then pointed out that there should be no human habitation around, considering the kind of chemicals being manufactured by the appellants. Learned counsel has drawn our attention to the various judgements of the Apex Court to contend that the court while considering the application for condonation of delay, must keep in mind not only the delay, but the court must consider as to whether the explanation offered by the Applicants is sufficient. In the instant case, it is pointed out the conduct of the Applicant cannot be said to be to gain an unfair advantage. Learned counsel places reliance in the judgment of the Apex Court in the case of N. Balakrishnan Vs. M. Krishnamurthy (1998) 7 S.C.C. 123, in the case of M.K. Prasad Vs. P. Arumugam (2001) 6 Supreme Court Cases 176 and in the case of Ramnath Sao alias Ram Nath Sahu and others Vs. Gobardhan Sao and others, (2002) 3 2002 3 S.C.C. 195.

2. On the other hand on behalf of the contesting respondents, the original plaintiffs, their learned counsel points out that the appellants have not come to the court with clean hands. The stand taken in affidavits filed by Advocate Balan before the trial court for setting aside the exparte decree is inconsistent with the pleadings before this court. The learned counsel has drawn our attention to the said pleadings. It is further pointed out that the delay is long. Apart from this it is pointed out that Respondent defendant have neither been paid compensation for the acquired land nor they have been intimated of any award passed in proceedings under the M.I.D.C. Act. It is therefore submitted that if the delay is condoned, the consequence would be that defendants herein will have no remedy at law even if they want to ventilate their grievance in so far as payment of compensation or notice.

. Heard also learned counsel appearing for M.I.D.C. as also the learned A.G.P. for the State, who has produced before us zerox copies of documents to indicate that Orders have been passed under Section 33 by the Collector in respect of the

lands claimed by the respondents under Section 33 of the M.I.D.C. Act.

3. At this stage itself, it may be noted that we have perused the said copies. We find in respect of the land which are claimed by the Respondent/Original Plaintiffs the compensation seems to have been paid in most cases on behalf of the original Plaintiff through his natural guardian and thumb impression is taken thereon. We have enquired at the bar from learned counsel for the L.R.s of original defendants, it is pointed out that the original defendant expired at the age of 72 years in the year 1986. The orders under Section 33 came to be passed in the year 1966. If that be the case, surely at this prima facie stage atleast, the compensation could not have been paid to any person other than the late defendant as he was very much a major.

. It is true that this aspect of the matter is not directly issue in so far as present appeal is concerned. This court apart from considering the sufficient cause has also to bear in mind equitable considerations so that the order to be passed is just and proper for all parties. It is also to be

borne in mind that no party should be deprived of its rights. If the contention of the M.I.D.C. is that the compensation had been paid to the defendants, then considering the controversy it will be best left to the reference court on reference being made under Section 34 of the MIDC Act to test the said contention. It is neither open to the Collector nor this court in exercise of the present jurisdiction to decide that controversy.

4. Considering the above and considering the contentions of the appellant claimants, we are inclined to pass the following order :

. Application is allowed in terms of Prayer Clause (a) subject to the condition that on the respondent/original Plaintiff's making an application to the Collector under Section 34 of the MIDC Act within four weeks from today, the Collector under Section 34 will thereafter within the period of four weeks, make reference as contemplated by Section 34(1) to the Reference Court. All questions as to whether the defendants were served and received the compensation are left open for consideration before the Reference Court.

On such reference being made, the delay in filing the appeal stands condoned and the appeal thereafter be placed for admission. In the event reference is not made within the period as directed above, liberty to the appellants to move this court.

6. Considering the fact that the delay was of four years and one month, ends of justice will be met if the appellants are called upon to pay the cost to the original Plaintiffs now respondents quantified at the sum of Rs.15,000/- to be paid within three weeks from today. Cost to be paid in the hands of the advocate on record before this court.

(F.I. REBELLO,J.)

(ANOOP V. MOHTA,J.)